The intentional act exclusion and employers' tort immunity

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In theory, workers' compensation applies "justice and rationality to the law of workplace accidents."[1] Louisiana's first workers' compensation system was enacted in 1914.[2] In 1976, legislators rewrote the Louisiana Worker's Compensation Act to exclude employers' tort immunity when the employee's injuries are the result of an intentional act.[3]

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The Legislature left the task of defining intentional acts to the courts. To prove that an employee's injuries qualify for the intentional act exclusion, a plaintiff must prove that the defendant "either (1) consciously desired the physical results of his act or (2) knew that that result was substantially certain to follow from that conduct."[4]

The quintessential "conscious desire" case is *Caudle v. Betts*.[5] In *Caudle*, the defendant shocked a co-worker in the neck with a condenser, thereby injuring the plaintiff's occipital nerve.[6] The defendant intended the contact and the offensive consequences — a battery — but not the unforeseen harmful consequences.[7]

Reasoning from general tort principles, the Louisiana Supreme Court held that the defendant was liable for the consequences of his act because he intended the offensive contact, an invasion of plaintiff's interests in an unlawful way.[8] Cases similar to *Caudle* usually qualify for an exception to workers' compensation exclusivity under La. R.S. 23:1032(B).[9]

The "substantial certainty" prong of the intentional tort exception is fact-intensive. When a trial judge is asked to evaluate the credibility of witnesses on questions of intent, knowledge, or motive, an appellate court often reverses granted summary judgment motions.[10] In *Quick v. Myers Welding and Fabricating, Inc.*, the plaintiff was ordered to weld bolts inside an oil collection tank.[11] Another welder, noticing smoke inside the tank, used a cutting torch to pipe oxygen into the tank. The plaintiff's clothing caught fire from the torch's flames and caused burn injuries.

The Third Circuit Court reversed the trial court's grant of summary judgment, holding that the question for trial would be whether "a welder who introduces oxygen into a tank where welding is in progress should know that a fire is substantially certain to occur."[12]

There are cases that hold that the violation of a safety rule alone is insufficient to support a finding of an intentional tort.[13] In violation-of-safety-rules cases, it is prudent to present evidence that demonstrates the defendant's knowledge that the accident was substantially certain to occur.[14]

In *Robinson v. North American Salt Co.*, the First Circuit affirmed the jury's finding that the employer's actions rose to the level of an intentional tort because, in addition to violating the company safety policy, other factual evidence established that the employer knew the accident was substantially certain to occur.[15]

The *Robinson* court relied upon the testimony of the plaintiff's expert witness,

a mechanical engineer, who stated that the employer's knowledge that the accident was substantially certain to occur was evident by his requiring the employee, who was working from a non-stationary, man-lift bucket, to reach over with a chipping hammer to repair the frame of the elevated, moving, conveyor belt near one of the belt rollers where an object easily could be caught.[16]

In *Wainwright v. Moreno's, Inc.*, the Third Circuit affirmed the fact finder's conclusion that the supervising employee knew with substantial certainty that the plaintiff would be injured when he ordered him back into the ditch for further digging.[17] In *Wainwright*, defendant's Occupational Safety and Health Administration violations were among many violations.[18]

An expert in civil engineering construction and construction safety testified that the ditch's cave-in was substantially certain to happen at the point the employer's foreman ordered the plaintiff back into the ditch.[19] Other evidence showed that the employer specifically brought in the supervisor who ordered Wainwright back into the ditch to speed up the operation.[20]

The Third Circuit agreed with the trial court that the defendant committed an intentional tort by ordering the employee to work in a ditch that caved in the previous day and that looked as though it would again cave in.[21]

In 2019, the Supreme Court in *Higgins v. Williams Energy Partners, L.P.* reaffirmed the fact-intensive nature of intentional act inquiries. The issue in *Higgins* was whether a defendant knew with substantial certainty that a chemical explosion was likely to occur based on its awareness of a hazardous condition that it ignored for over a decade.[22] The Supreme Court reversed the lower courts' granting of summary judgment — holding that the fact finder should weigh the evidence.

In *Higgins*, the trial court allowed the cases of multiple plaintiffs to be consolidated for discovery only.[23] Discovery revealed that the explosion occurred because a reboiler was improperly cut off from a pressure-relief vent, causing it to over pressurize and rupture. Plaintiff's experts reviewed the facility's records and determined that the dangerous situation arose around 2001 when block valves were added to

the process flow lines for the reboilers.[24] This isolated the reboilers from the pressure-relief system making it substantially certain that over pressurization would occur.

As early as 2006, the defendant became aware that it needed to lock open at least one of the manual valves associated with each of the reboilers.[25] However, as the defendant's 2012 piping and instrumentation diagram showed, only the in-service reboiler was car-sealed open. Plaintiff's experts argued that "the out-of-service reboiler … was placed in an unsafe operating mode that was severe and could cause death or injury."[26]

The defendant argued that "mere knowledge and appreciation of risk does not constitute intent."[27] In 2018, a First Circuit Court of Appeal panel held that the plaintiff had not shown that the defendant "knew with substantial certainty that the chemical explosion was to occur."[28] The First Circuit reasoned that management's awareness that its blocked reboiler was hazardous was not enough to prove an intentional tort.[29]

The Supreme Court reversed the lower courts' dismissal of the intentional tort claims on summary judgment because "genuine issues of material fact remained." This reversal became the law of the case for other plaintiffs suing Williams Energy Partners L.P. for the same 2013 explosion.[30]

Intentional act exclusions under La. R.S. 23:1032(B) are fact-intensive inquiries best resolved by considering the totality of the evidence. When a case turns on subjective intent or the credibility of witnesses, the matter is best resolved by the fact finder at a trial on the merits.

Endnotes

1. Witt, John Fabian. "The Transformation of Work and the Law of Workplace Accidents," 1842-1910, 107 *The Yale Law Journal.* 1467, 1486 (1998).
2. 1976 La. Acts 20.
3. La. R.S. 23:1032(B).
4. *Bazley v. Tortorich*, 397 So. 2d 475, 482 (La. 1981); *Mayer v. Valentine Sugars, Inc.*, 444 So. 2d 618, 620 (La. 1984); *Batiste v. Bayou Steel Corp.*, 2010-1561, pp. 2-3 (La. 10/1/10), 45 So. 3d 167, 168-69.
5. 512 So. 2d 389 (La. 1987) (reversing the lower courts for finding against the plaintiff after a bench trial because the

defendant did not intend to injure the plaintiff).

6. *Id*. at 389.
7. *Id*. at 391.
8. *Id*.
9. *See*, e.g., *Allen v. Payne & Keller Co., Inc.,* 710 So. 2d 1138 (La. App. 1 Cir. 1998), *writ denied*, 726 So. 2d 908 (La. 1998) and *writ not considered*, 737 So. 2d 739 (La. 1999) (the "bumping" of bent-over claimant by coworker was an intentional tort); *Kennedy v. Parrino*, 555 So. 2d 990 (La. App. 1 Cir. 1989) (employee's complaint stated cause of action sounding in intentional tort against employer even though defendant did not intend to injure plaintiff by hitting coworker in back with fists); *Gagnard v. Baldridge*, 1992-1415 (La. 1993), 612 So. 2d 732 (the striking of an employee by the employer on the back, triggering post-traumatic stress disorders, was an intentional tort); *Wakefield v. Kyle*, 12 So. 3d 468, 470 (La. App. 2 Cir. 2009 (defendant's intentionally striking of plaintiff's head with a bolt cutter satisfied the intentional tort requirement); but see *Young v. Doe* (La. App. 5 Cir. 2011), 67 So. 3d 632 (holding that harm caused by touching a coworker with a plate was not intended and therefore did not qualify for the intentional act exception), and *Bruno v. Bellsouth/The Berry Co.*, 10-413 (La. App. 5 Cir. 2011), 59 So. 3d 1265, *writ denied*, 2011-292 (La. 4/1/11), 2011 WL 1619631 (holding that injuries that resulted from a water gun fight were not covered by the intentional tort exception).
10. *See*, e.g., *Belgard v. American Freightways, Inc.*, 99-1067 (La. App. 3 Cir. 12/29/99), 755 So. 2d 982, *writ denied*, 00-0293 (La. 3/31/00), 756 So. 2d 1147 (reversing trial court's grant of summary judgment in favor of the employer because a genuine issue of material fact existed as to

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whether the employee's supervisor had knowledge of the likelihood of harm in ordering the employee into an area with dangerous fumes without protective equipment); *Holmes v. Pottharst*, 557 So. 2d 1024 (La. App. 4 Cir. 1990) (reversing of trial court's grant of summary judgment on whether the defendants knew that the protective clothing provided to the sand-blaster would be inadequate); *Knox v. Pelias*, 522 So. 2d 715 (La. App. 5 Cir. 1988) (reversing trial court's grant of summary judgment when plaintiff sustained injuries when riding in a van with numerous safety deficiencies because a genuine issue of material fact existed as to whether the supervisors were aware of the defects); *Hare v. Ganaway Construction Co.*, 536 So. 2d 722 (La. App. 3 Cir. 1988), *writ denied*, 539 So. 2d 633 (La. 1989) (reversing trial court's grant of summary judgment because a genuine issue of material fact existed as to whether the condition of the ladder that plaintiff was ordered to use was such that the defendant should have known with substantial certainty that its use by Hare would result in an accident).

11. 94-282 (La. App. 3 Cir. 12/7/94), 649 So. 2d 999, 1001, *writ denied* (La. 1995), 653 So. 2d 598.
12. *Id*. at 1002.
13. *Cortez v. Hooker Chem. & Plastics Corp.*, 402 So. 2d 249 (La. App. 4 Cir. 1981) (holding that deficiently designed machinery and disregard of OSHA safety provisions did not satisfy the substantial certainty prong of 1032(B)); *Reeves v. Structural Preservation Systems*, (La. 1999), 731 So. 2d 208, 212-13 (reversing the jury's finding that a violation of the OSHA guidelines that prohibited a 1200-pound pot from being moved manually met the requirements of the substantial certainty exception); but see *id*. at 214-15 (dissent of Justice Bernadette Johnson because the majority's logic would have required one employee to be injured by improper workplace practices before another employee could be compensated).
14. *See*, e.g., *Pennier v. Morton Int'l, Inc.*, 2011 WL 6160207 (W.D. La. 6/24/11) (overruling magistrate judge's ruling that (1) non-diverse defendants had been improperly

joined and (2) Pennier did not have a valid intentional tort cause of action based on the allegation of fraud on the part of at least one non-diverse defendant. According to Judge Rebecca Doherty, the allegation of fraud, an intentional tort defined as "a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other," brought Pennier's cause of action into the realm of a 1032(B) intentional tort).

15. 02-1869 (La. App. 1 Cir. 6/27/03), 865 So. 2d 98, 105, *writ denied*, (La. 2003), 860 So. 2d 1139.
16. *Id.* at 102, 107.
17. 602 So. 2d 734, 738 (La. App. 3 Cir. 1992).
18. *Id.* at 739.
19. *Id.* at 741.
20. *Id.* at 739.
21. *Id.*
22. *Higgins v. Williams Energy Partner, L.P.*, 2019-0049 (La. 3/6/19), 266 So. 3d 897 (granting writ, reversing lower courts' dismissal, and remanding because "genuine issues of material fact" remained as to "whether the defendant is liable to this plaintiff as the result of an intentional act pursuant to La. R.S. 23:1032(B)").
23. *Higgins v. Williams Energy Partner, L.P.*, 2017-1662 (La. App. 1 Cir. 12/12/18), 267 So. 3d 1133, fn 2, *rev'd*, 2019-0049 (La. 3/6/19), 266 So. 2d 897.
24. The plaintiff hired two experts: an independent engineer consultant and an engineer consultant.
25. *Higgins*, 267 So. 3d at 1137.
26. *Id.* at 1140.
27. The defendant attached the affidavit of its director of operations and technical services for the facility.
28. *Higgins v. Williams Energy Partners L.P.*, 2017-0390, 2017-0391, and 2017-0392 (La. App. 1 Cir. 12/21/17), 240 So. 3d 207.
29. Here, the First Circuit relied upon *Miller v. Sattler Supply Co., Inc.*, 2013-2558 (La. 1/27/14), 132 So. 3d 386, 388.
30. *Higgins v. Williams Energy Partner L.P.*, 2017-1662, 2017-1663, 2017-1665, and 2017-1666 (April 10, 2019), 280 So. 3d 195 (reversing the trial court's grant of the defendant's motion for summary judgment for Artie Hudson and Jeffery Wells because genuine issues of material fact remained as to whether the defendant's conduct rose to the level of an intentional tort, namely whether the defendant knew with substantial certainty that a chemical explosion was going to occur).